

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Blacktower Capital Pty Ltd
(represented by Mr John Prior, instructed by Mr Peter Fraser of Dwyer Durack Lawyers)

Interveners: Director of Liquor Licensing

Commissioner of Police

Executive Director of Public Health
(all represented by Mr Nikolas Barron of State Solicitor's Office)

Commission: Mr Jim Freemantle (Chairperson)
Dr Eric Issachsen (Member)
Ms Belinda Lonsdale (Member)

Matter: Application for review of a decision by the Director of Liquor Licensing pursuant to section 25 of the *Liquor Control Act 1988*.

Premises: Wolfe Lane
G 321 Murray Street, Perth

Date of Hearing: 27 November 2014

Date of Determination: 22 December 2014

Date of Reasons for Determination: 10 February 2015

Determination: The application is granted in part subject to the following conditions in addition to those already imposed on the licence:

1. The following trading hours shall be imposed on the extended trading permit (ongoing hours):
 - Wednesday to Saturday: 12 midnight to 1:00 am the following morning.
2. The following trading conditions shall be imposed on the extended trading permit (ongoing hours):
 - a) From midnight the sale and supply of drinks in such a way that would encourage rapid consumption of liquor is prohibited.
 - b) From midnight no liquor is to be supplied and mixed with energy drinks.
 - c) Patrons are prohibited from entering and re-entering the licensed premises thirty minutes prior to the close of trade as stated on the extended trading permit (i.e. a lock-out will apply).
 - d) Food is to be available throughout all hours of trade.
 - e) The licensee must not permit entry to the licensed area of any person wearing a jacket or any other clothing bearing patches or insignia including accoutrements, jewellery, visible tattoos, branding or any other items which indicate membership or association with any motor cycle gangs including but not limited to the following:
 1. Coffin Cheaters;
 2. Club Deros;
 3. God's Garbage;
 4. Gypsy Jokers;
 5. Outlaws;
 6. Finx;
 7. Rebels;
 8. Commancheros;
 9. Mongols;
 10. Hells Angels; and
 11. Rock Machine.
3. The following conditions shall replace the current condition numbered 7 on the licence 634012778:

Crowd controllers licensed under the *Securities and Related Activities (Control) Act 1996* are to be employed at the venue from:

1. Friday: two (2) crowd controllers from 8:00pm until thirty (30) minutes after the close of trade; and
2. Saturday: one (1) crowd controller from 8:00pm until thirty (30) minutes after the close of trade.

Authorities referred to in the decision

- *Liquorland Australia Pty Ltd v Executive Director of Public Health* [2013] WASC 51
- *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [LC36/2014]

Background

- 1 On 8 August 2014, the applicant was refused an Extended Trading Permit (“ETP”) for the premises situated at 321 Murray Street, Perth known as “Wolfe Lane” (Decision A224717) and subsequently lodged an application for review with the Liquor Commission (“the Commission”) on 5 September 2014.
- 2 Both the Commissioner of Police (“the Police”) and the Executive Director of Public Health (“EDPH”) intervened in the original application and exercised their right to intervene in this review as did the Director of Liquor Licensing (“the Director”).
- 3 A hearing of the matter was held on 27 November 2014.

Submissions on behalf of the applicant

- 4 The applicant was denied procedural fairness in that the delegate of the Director did not put it on notice that he did not accept the finding of the Manager Liquor Compliance that there was no evidence to support potential breaches of section 102 and section 104 of the *Liquor Control Act 1988* by either the applicant or the Publican Group Australia Pty Ltd.
- 5 Furthermore, the delegate did not advise the applicant that he was going to have regard to the personal particulars form lodged on 6 July 2014 and a letter from the Publican Group concerning an infringement notice.
- 6 The delegate breached section 16(11) by not providing documents named in paragraph 5 above.
- 7 The delegate erred in:
 - 1) finding that the applicant does not manage the businesses as required by the Act;
 - 2) failing to adequately consider the evidence of consumers requirement;
 - 3) giving undue weight to the evidence of alcohol-related harm;
 - 4) failing to give adequate weight to the category of licence;
 - 5) failing to consider whether conditions attached to the licence and ETP sought, would satisfactorily mitigate the issue of perceived harm.
- 8 The application and supporting evidence establishes there is significant public interest in the grant of the application.

- 9 The evidence submitted included a comprehensive Public Interest Assessment (“PIA”) and 82 consumer surveys together with 14 witness statements supporting the requirement for the extended trading hours.
- 10 CAD and IMS reports indicate that the level of antisocial and violent behaviour associated with the premises is low.
- 11 The licensing authority has granted a number of ETP’s in the immediate vicinity in relatively recent times. (The applicant submitted a table detailing ETP’s in the immediate vicinity.)
- 12 The premises for which the application is made is operated as a “small bar” which are generally accepted and acknowledged as low risk venues.
- 13 The applicant has volunteered a number of conditions to be attached to its licence which mitigate any perceived incremental harm.
- 14 The evidence led by the Commissioner of Police (“the Police”) references work done by Professor Chikritzhs which concluded that a reduction in trading hours led to significant reduction in violence and road trauma and supports a conclusion that there may be a reduction in violence and road trauma associated with a particular venue if its trading hours are reduced. However, the findings specifically relate to hotels and cabarets and therefore are not relevant to these proceedings.
- 15 The BAL research to which the delegate referred was specific to a demographic (male 18-25 years) whereas the applicant’s premises specifically target and cater for an older demographic.
- 16 The general evidence led by both interveners needs to be treated with caution as the conclusions are not always applicable to specific locations or types of licence. Conclusions to be drawn from such studies as that of Professor Gray to which the delegate referred were relevant to the situation (aboriginal communities in Kununurra) but not applicable to the applicant’s situation.

Submissions on behalf of the Director of Liquor Licensing

- 17 The Director submitted that the decision was supported by the evidence before the delegate.
- 18 Having regard to the level of alcohol-related harm and ill-health in the locality, particularly during the extended hours sought by the applicant, the delegate’s decision was clearly open to him, and it remains open for the Commission to endorse that decision.
- 19 Whether or not the applicant strictly complied with its requirements under the Act, having regard to the potential for harm there are compelling grounds in support of the delegate’s decision to refuse the application.

- 20 In essence the delegate could not be satisfied that it was in the public interest to grant the application because:
- 1) there was no “overwhelming” (or significant) consumer requirement for the application;
 - 2) it appeared the applicant was not strictly compliant with section 100 of the Act; and
 - 3) the locality was problematic in relation to alcohol-related harm, and in the circumstances of this case, the objects in sections 5(1)(a) and 5(1)(b) far outweighed the interests of the applicant and the submitted consumer need.
- 21 The delegate clearly understood that he was required to undertake a “weighing and balancing exercise” to assess the competing objects of the Act.
- 22 Given the level of alcohol-related harm in the locality, particularly in the extended hours sought by the applicant, the delegate’s decision was clearly supported by the evidence before him.
- 23 The applicant was not denied procedural fairness as the delegate was entitled to obtain information in such a manner as he thought fit. He was required to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms; see section 16(7)(a)-(b) of the Act.
- 24 The delegate was simply required to ensure that each party was given a reasonable opportunity to present its case and, in particular, to inspect any documents to which he proposed to have regard.
- 25 The applicant contends that the delegate failed to place it on notice that he:
- 1) did not accept that there was no evidence of breaches of sections 102 and 104 of the Act; and
 - 2) would have regard to the personal particulars form lodged on 6 July 2012 and a letter from the Publican Group Australia dated 13 September 2013.
- 26 At paragraph [96] of the decision, the delegate said he had “serious concerns as to management of the business conducted under the licence, in compliance with the duties of a licensee and an approved manager under section 100 of the Act” and found that the applicant did not manage the business conducted under the licence at the premises, as required by the Act. The delegate did not find that there was evidence of breaches of section 102 and 104 of the Act.
- 27 The real question is whether section 100 had been complied with by the applicant in managing the business as the delegate had expressed concern that the issue of an ‘infringement notice handed to the approved manager was addressed by an employee

of the Publican Group who had no responsibilities under the Act in respect of the premises.

- 28 In any event there was an amount of correspondence between the delegate and the applicant concerning the role of "The Publican Group of Australia" concerning the conduct and the business under the licence, to which the applicant had responded. Thus it cannot be claimed the applicant had not been put on notice.
- 29 In the personal particulars form lodged on 6 July 2012, Scott Paul Jones and Natalie Louise Harold, both stated in answer to the question as to how they intended to carry out their responsibilities that a suitably qualified full time manager, Publican Group Australia, would be appointed to run the bar.
- 30 These responses indicate that Publican Group would manage aspects of the business under the licence.
- 31 This was further supported by correspondence between:
- 1) the inspector and Mr Pisaneschi who indicated he reported to Mr Caruso of Publican Group
 - 2) the licensing authority and Caruso (on Woolfe Lane letterhead) concerning the infringement notice (which indicates Publican Group believed it was authorised to deal with the matter).
- 32 Whilst consideration of the applicant's arrangements with Publican Group Australia are relevant, in the circumstances of this application the central issue to be determined is assessing the risk of alcohol related harm or ill health that may be associated with granting the application and the submissions of the Police and the EDPH demonstrate that there is a significant level of alcohol related harm extant in the area.

Submissions of behalf of the Commissioner of Police

- 33 The Police contended that:
- 1) alcohol is involved in a very significant proportion of violent crime in the area;
 - 2) crime statistics in the locality are consistent with research that shows the strong correlation between alcohol and violent crime;
 - 3) police attendance for antisocial behaviour reports disturbances that require intervention and show that a significant portion of interventions are required each day between 9pm and 3am; and
 - 4) of 1927 interventions in the 9pm to 3am period, 589 occur on Friday night / Saturday morning or Saturday night / Sunday morning.

- 34 There is already a significant level of alcohol-related harm and ill-health in Perth in the form of alcohol-related crime.
- 35 The statistics provided confirm that alcohol is involved in a very significant proportion of violent crime in the area.
- 36 These statistics show that alcohol was a factor in 51% of domestic assaults, and 38% of non-domestic assaults. Alcohol was also a factor in a significant number of sexual assaults (16%) and threatening behaviour offences (18%).
- 37 Overall, alcohol was a factor in more than a third of violent crime (assaults, sexual assaults and threatening behaviour).
- 38 CAD and other police data shows that there is a strong correlation between alcohol and violent crime with reviews of the literature estimating that between 41% and 70% of violent crimes are committed under the influence of alcohol.
- 39 Another statistical indicator of alcohol-related harm is the number of police attendances for reports of antisocial behaviour and disturbances that required intervention.
- 40 That information indicates that a significant proportion of interventions (1927 out of 6411 interventions) are required between midnight and 3am, and between 9pm and midnight. On Saturdays, that six hour period accounts for roughly 35% of police interventions required on that day. The figure is 36% for Sundays.
- 41 Further, it can be observed that interventions are required at a much greater rate after midnight on days which are later in the week: Of the 885 interventions required between 12am and 3am during the period covered by the CAD information, 73% occurred on Thursday, Friday, Saturday or Sunday mornings. These are the same periods in which the applicant proposes to extend its trading.
- 42 The grant of the application will increase the availability of alcohol in Perth, including on weeknights after 12am, and particularly between midnight and 2am on Thursdays through Sundays. In this regard, the Commissioner notes that there are 187 existing licenced premises in Perth (including the subject premises), including three small bar liquor Licensees holding ETPs allowing trading until 1am, 12 tavern Licensees holding ETPs (including three with ETPs allowing trading until 2am on Friday and Saturday), and one hotel Licensee with an ETP allowing trading until 2am.

Submissions on behalf of Executive Director of Public Health

- 43 The EDPH submitted that:
- 1) in the period 1 March 2012 to 31 March 2013 there were 730 assaults in the suburb of Perth, of which 43.2% were recorded as being alcohol-related;
 - 2) the majority of those offences occur in the period midnight to 1am and 1am to 2am (i.e. the extended trading hours sought by the applicant);

- 3) drink driving statistics in Perth reveal in excess of 300 charges being laid in the years 2009, 2010 and 2011, in which a majority identified a licensed premises as the last place of drink;
- 4) those statistics are consistent with research that the majority of drink driving offences committed between 10pm and 4am are linked to licensed premises rather than private premises.

This confirms that there is already a significant level of alcohol-related harm and ill-health in the locality.

44 Academic research by Catalano, Stockwell, Chikritzhs and Briscoe & Donnelly indicates that the grant of ETPs resulted in greater consumption of alcohol and increased levels of violence, for example studies finding:

- 1) levels of monthly assaults associated with hotels that had an ETP nearly doubled compared to hotels with normal hours;
- 2) assaults on licenced premises in inner-urban areas were concentrated late at night or early in the morning and on weekends; and
- 3) a consistent and robust relationship between alcohol-related violence and outlet opening hours has received strong empirical support.

Specific works cited were:

- 1) Tanya Chikritzhs and Tim Stockwell, "The Impact of Later Trading Hours for Australian Public Houses (Hotels) on Levels of Violence" (September 2002) 63(5) *Journal of Studies on Alcohol* 592.
- 2) Suzanne Briscoe and Neil Donnelly, "Problematic Licenced Premises for Assault in Inner Sydney, Newcastle and Wollongong" (2003) 36(1) *The Australian and New Zealand Journal of Criminology* 19, 29.
- 3) National Drug Law Enforcement Research Fund, *Dealing with alcohol-related harm and the night-time economy* (Monograph Series No. 43, April 2012) 172.

45 There are no reasons to suggest the findings of the studies would be significantly different if replicated by a contemporary study in Perth.

46 Whilst there is necessarily an element of speculation in anticipating what may or may not happen in the future, the studies referred to by the EDPH provide strong evidence that the grant of the application would likely result in an increase in the already significant level of alcohol-related harm and ill-health in Perth.

Determination

- 47 Under section 25(2c) of the Act, when considering a review of the decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
- 48 On review under section 25 of the Act, the Commission may –
- a. *affirm, vary or quash the decision subject to review;*
 - b. *make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance;*
 - c. *give directions –*
 - i. *as to any question of law, reviewed; or*
 - ii. *to the Director, to which effect shall be given; and*
 - d. *make any incidental or ancillary order.*
- 49 In conducting a review under section 25, the Commission is not constrained by a finding of error on part of the Director, but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials (refer *Hancock v Executive Director of Public Health [2008] WASC 224*).
- 50 Pursuant to section 38(2) of the Act, an application for the grant of a licence must satisfy the licensing authority that granting the application is in the public interest. To discharge its onus under Section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community.
- 51 Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd [2007] WACA 175* and *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*.)
- 52 The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142* where he said:

“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor generally speaking, can it be defined. It is not desirable that the courts and tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the

public, society or the nation and its content will depend on each particular set of circumstances.”

53 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations; refer *Palace Securities Ltd v Director of Liquor Licensing* (1992) 7 WAR 241. The primary objects of the Act are:

- 1) *to regulate the sale, supply and consumption of liquor;*
- 2) *to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and*
- 3) *to cater for the requirements of consumers of liquor and related services with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.*

54 Section 33(1) of the Act gives the Commission an absolute discretion to grant or refuse an application on any ground or for any reason that it considers to be in the public interest. The scope of this discretion was recently considered by EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 [32]:

“[Section] 33(1) is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole. Section 5(2) in requiring the licensing authority to have regard to the primary and Secondary objects of the Act, which are already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest to make those objects the exclusive consideration nor the sole determinants of the public interest”.

55 Each application must be considered on its merits and determined on the balance of probabilities pursuant to section 16 of the Act. However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests; refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258.

56 This review deals with an application for an ETP for premises known as “Wolfe Lane” which can be properly described as a small bar accommodating a maximum of 120 patrons at one time. The evidence led by the applicant includes witness statements and consumer requirement surveys that support the applicant’s contention that the premises are designed to, and do attract a more mature patron demographic.

57 It was common ground between the applicant and the interveners that the vicinity experienced a higher than average level of alcohol-related harm.

- 58 The applicant submitted that it operated a “low risk” venue viz a small bar and that the extra hours sought would not increase the level of alcohol-related harm given the conditions imposed on the licence.
- 59 The applicant also lodged a table giving details of the other licensed premises in the vicinity and argued that approving an extended trading permit would do no more than bring Wolfe Lane in line with other premises in the vicinity and approval was consistent with recent approvals by the licensing authority in the vicinity.
- 60 This evidence is something of a two edged sword as on the one hand it supports the line of argument of consistency with other premises in the area but on the other indicates that patrons are well enough served by existing venues trading beyond midnight and thus a requirement for the additional hours is more difficult to demonstrate.
- 61 The interveners submitted that given the high level of alcohol-related harm in the vicinity the approval of this application had the potential to unacceptably increase levels of harm and ill-health.

The Police in particular supplied CAD and other statistical information supporting the claim of high existing levels of harm.

- 62 In the case of the EDPH the evidence was general and not area or premises specific. Whilst this generality may lead to a lessening of the weight the Commission places on such evidence, it is still cogent in pointing out the correlation between later/extended trading hours and levels of harm and ill-health.
- 63 The EDPH quoted a recent report from the National Drug Law Enforcement Research Fund which found that:

According to all of the independent reviews available nationally and internationally, restricting trading hours is the most effective and cost-effective measure available to policymakers to reduce alcohol-related harm associated with licensed venues. A consistent and robust relationship between alcohol-related violence and outlet opening hours has received strong empirical support (emphasis added).

- 64 Whilst the applicant criticised the fact that much of the evidence in respect of harm was not venue specific, as the Police submitted, a direct causal relationship between the premises and harm or ill-health is not a prerequisite in itself of assessing the impact of granting a licence (or permit in this case). (See *Carnegies Realty Pty Ltd v Director of Liquor Licensing [LC36/2014]*).
- 65 The Commission is mindful of the comments of Bell J in *Kordister Pty Ltd v Director of Liquor Licensing [2012] VSCA 325*

“...for general evidence on its own, can be relevant to decision making under the Liquor Reform Act, the question is, how relevant is such evidence and what importance it should be afforded in the given case. That depends on the tribunal’s

evaluative judgement about the harm which is occurring or likely to occur.....
(emphasis Commission's).

66 Also as Edelman J put it in *Liquorland (Australia) Pty Ltd v Executive Director of Public Health* [2013] WASC 51

In assessing the overall question of whether granting the application is in the public interest it is relevant to consider the baseline level of risk and, in that context, the effect of an increase in risk from the baseline level. It may be that where an existing level of risk is greater, a small increase in risk is less likely to be tolerated.

67 The Commission shares the concern of the interveners about the potential for harm particularly in reference to the principles of Lily Creek that even a small increment of potential harm was of concern given the facts of the application. However, based on the evidence before it and on balance of probabilities, the Commission could not be satisfied that the grant of this permit would result in such harm which would be unacceptable.

68 Furthermore, placing controls on the type of drinks to be sold later in the night and the provision of food at all times would sufficiently mitigate any incremental harm that might be caused by the grant of the application.

69 As a further attempt to balance the public interest being served by grant of this permit with any resultant harm arising as a result of the grant of this permit, the Commission has exercised its discretion to extend trading hours by only 1 hour rather than the 2 additional hours sought and a lockout has been imposed to assist in the orderly dispersal of patrons at and around closing time.

70 The applicant argued that it was not accorded procedural fairness in that it was not put on notice regarding a letter it wrote on 13 December 2013 as well as the personal particulars completed by persons to be approved managers lodged on 6 July 2012.

71 The applicant further argues that denial of procedural fairness was not avoided by stating that the documents would have been within the custody or control of the applicant.

72 The Commission is of the view that these documents were more than simply "within the custody or control of the applicant"; they were part of recent and active interchanges between applicant and licensing authority.

73 Furthermore the letter from the delegate to the applicant dated 30 October 2013 quite specifically raised the matters about which he was concerned in regard to the management of the premises including the role of Publican Group Australia.

74 The applicant was thus on notice by the timing, nature and specificity of the correspondence and it is the Commission's view that there was no denial of procedural fairness and the applicant was given a reasonable opportunity to present its case; see *Northbridge Enterprises Pty Ltd v Commissioner of Police* [2014] WASC 135.

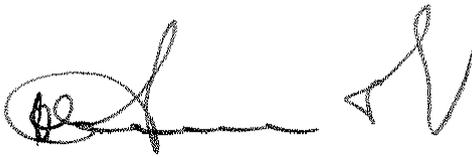
- 75 Lastly, whilst the delegate covered the issue of the conduct of the business pursuant to the requirement of section 100 in some detail it is apparent from considering his determination that the real issue on which his decision focused was the issue of harm and ill-health.
- 76 Ultimately, the Commission finds that the public interest is properly served by the grant of the application with some modification of the trading hours sought and subject to the conditions imposed as follows:
1. The following trading hours shall be imposed on the extended trading permit (ongoing hours):
 - Wednesday to Saturday: 12 midnight to 1:00 am the following morning.
 2. The following trading conditions shall be imposed on the extended trading permit (ongoing hours):
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3. The following conditions shall replace the current condition numbered 7 on the licence 634012778:

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1. Friday: two (2) crowd controllers from 8:00pm until thirty (30) minutes after the close of trade; and
2. Saturday: one (1) crowd controller from 8:00pm until thirty (30) minutes after the close of trade.

- 77 Therefore the application is granted in part subject to the above conditions in addition to those already imposed on the licence.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', written over a horizontal line.

JIM FREEMANTLE
CHAIRPERSON